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# ARTICLE

## DEVELOPMENT ON A CRACKED FOUNDATION: HOW THE INCOMPLETE NATURE OF NEW DEAL LABOR REFORM PRESAGED ITS ULTIMATE DECLINE

*A Response to Cuéllar, Levi, and Weingast*

LEO E. STRINE, JR.\*

Reading Mariano-Florentino Cuéllar, Margaret Levi, and Barry R. Weingast's<sup>1</sup> essay, *Twentieth-Century America as a Developing Country: Conflict, Institutions, and the Evolution of Public Law*,<sup>2</sup> gives a twenty-first-century admirer of the New Deal and European social democracy a temporary nostalgic lift, which is then followed by melancholy. The reason is that the benefit of looking back from the last part of the second decade of this century is to recognize just how much of the gains rightly celebrated by the Authors have been eroded. In doing an excellent job making a case for the essentiality of law in guaranteeing stability, compromise, and the peaceful resolution of disputes between employers and their workforce, the Authors implicitly also underscore another reality: that something is essential does not mean that it is, in itself, sufficient.

In responding to this provocative and incisive essay, I will focus on a select number of factors conducive to the important legal developments that *America as a Developing Country* champions, as well as some of the factors that can, in retrospect, be seen presaging the ultimate undermining of those developments. Recognizing that the Authors' analysis primarily involves a positive historical analysis, I will also offer some normative thoughts on what I believe are the necessary steps to preserve—and to some extent, restore—the stability and gainsharing enabled by the new forms of public law the Authors have adeptly analyzed.

In particular, I will note how the New Deal's acceptance of the most unsavory aspects of our nation's history—specifically its acquiescence to Jim Crow and a political power structure that did not fully share the princi-

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<sup>1</sup> For ease of reference, I shall refer to Cuéllar, Levi, and Weingast as "the Authors."

<sup>2</sup> Mariano-Florentino Cuéllar, Margaret Levi & Barry R. Weingast, *Twentieth-Century America as a Developing Country: Conflict, Institutions, and the Evolution of Public Law*, 57 HARV. J. ON LEGIS. 25 (2020) [hereinafter *America as a Developing Country*].

ples of the National Labor Relations Act (“NLRA”)<sup>3</sup>—impeded the ultimate realization of gainsharing for American workers. That is, consistent with the Authors’ recognition that the United States that was reformed by the New Deal was a developing, not fully developed, nation, this Article focuses on the extent to which the New Deal’s failure to eradicate ideological divisions, inequities, and power structures rooted in our nation’s history affected the ultimate success of the New Deal in the key areas of working people’s rights and economic security.

My emphasis will be more on the gloomy side of things, rather than on the optimistic. But my reason for that is itself positive in spirit, not negative. Unless we candidly consider and thoughtfully address the foundational weaknesses that ultimately undercut the effectiveness of the New Deal-social democratic approach to protecting American workers’ fair expectations, we are unlikely to restore the leverage and equitable treatment working people in this nation deserve.

In particular, I will identify fundamental difficulties the NLRA faced once the United States’ unchallenged position as a hegemonic economic powerhouse ended. These difficulties had their origins in the incompletely realized nature of the New Deal, and involved:

- The failure of the New Deal to obtain the full support of the American South for the rights of working people, as opposed to the South’s willingness to accept subsidies in the form of infrastructure investments, middle-class entitlements, and other largesse from the wealthier regions of the nation;
- The failure of the New Deal to address racial inequality, both during the New Deal and in fighting World War II itself, resulting in a rift within the working class between a newly unified and prosperous white working class and black Americans;
- The failure of the New Deal to embed the protections for working people exemplified by the NLRA, the Fair Labor Standards Act of 1938,<sup>4</sup> and others, in the post-War international trading regime. The post-War regime instead gave clout only to mobilized capital and not to working people, and exposed American workers to competition from workers who lacked equivalent collective-bargaining rights and protections from unsafe working conditions; and,
- The dependency of the NLRA itself on faithful implementation by the Executive Branch, and by a judiciary that would hold the executive accountable for fidelity to the statute’s purpose, a dependency that left the statute vulnerable to undermining by pres-

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<sup>3</sup> 29 U.S.C. §§ 151–169 (2018).

<sup>4</sup> 29 U.S.C. §§ 201–219 (2018).

idential administrations who viewed unions as things to be made fewer in number and weaker in influence.

To move forward in a productive and more equitable direction now, a renewed effort must be made to address these issues. To this day, the South lags behind most of the nation in economic prosperity,<sup>5</sup> and its working- and middle-class workers could benefit from increased voice in making progress. And politicians are still able to exploit racial tensions and divide the working-class vote in a way that compromises the ability to restore potency to the union movement. Similarly, the international trading regime's failure to sufficiently protect labor rights has led to calls to restrict trade to protect working people and to the increasing identification of the "other," in the form of foreign workers and immigrant labor, as the source of declining real wages for American workers. Compounding these problems has been a federal judiciary increasingly hostile to the rights supposedly enshrined in the NLRA,<sup>6</sup> and a National Labor Relations Board ("NLRB") that has done little to make those rights have meaning in the real economy.<sup>7</sup>

Absent a forthright agenda that emphasizes the shared interests of working people of all colors, as well as connects the decline in gainsharing between workers and the corporations for whom they toil with the decline in unions and overall employee voice, an enlightened approach to addressing growing inequality in our nation is unlikely to emerge. That agenda must address the reality that the world's economy has become irreversibly globalized. There is no constructive and humane way forward that does not require the hard work of extending enforceable labor rights internationally and putting increasing upward pressure on employers to increase worker pay and wellbeing throughout the world's trading markets. The New Deal idea that all workers deserve economic security, safe working conditions, and a fair say is not outdated; it is widely shared throughout the OECD nations, and most in the developing world seek to implement it in their own nations. What is outdated is the thought that this idea can work without making it the rule of law across the scope of the economy in which we expect American workers to compete. Just as the New Deal reflected the reality that an effective national system was required to make a nationwide economy work better for the many, so too must any agenda to help working people reflect the reality of a global economy and the need for law's effectiveness to expand accordingly.

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<sup>5</sup> See Sharon Nunn, *The South's Economy Is Falling Behind: 'All of a Sudden the Money Stops Flowing,'* WALL ST. J. (June 9, 2019), <https://www.wsj.com/articles/the-souths-economy-is-falling-behind-all-of-a-sudden-the-money-stops-flowing-11560101610> [<https://perma.cc/NNW5-4ATE>] (documenting that the South's per capita income has been below other regions since the 1890s).

<sup>6</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1138 (2018) (exempting automotive service advisors from NLRA).

<sup>7</sup> See, e.g., *Emanuel Johnson Controls, Inc.*, 368 N.L.R.B. 20 (2019) (approving more lenient standard for decertifying unions).

This response proceeds in two parts. Part I engages with the Authors' positive analysis of the factors that led to the survival of our nation's constitutional democracy, emphasizing certain other dynamics that I believe contributed to the stability and compromise necessary to make our democracy work in the face of the Great Depression. Part II takes a pessimistic turn, describing the negative aspects of the United States law and development story that ultimately undermined the ability of the NLRA to realize its promise of providing working Americans with the leverage necessary to obtain fair gainsharing from their employers.

## I.

I largely agree with the story told in *America as a Developing Country* about the NLRA's development. But I thought it might be modestly useful to tease out a few dynamics that I think contributed to the optimistic story the Authors tell.

First of all, our nation's history provided a strong bulwark against the authoritarian answer. This is not to say that an authoritarian answer to the Great Depression was not possible. But there were reasons to think that the United States was less susceptible to that answer, or to answers involving revolution and violence. Even by the 1930s, it is doubtful that most Americans were ignorant of the awful costs of our Civil War, and in any way anxious to risk courses of action that would again risk violence on that sort of scale.

As important, we had a creedal notion of the nation: unlike most other nations, the United States in particular had to be built out of some notion of shared ideals. At its most fundamental, the entire U.S. existence exemplified rejection of deference to authoritarian rule because that regime is not accountable to the people. This was the very reason to be of the United States. And although much about our creed is contestable, it is less contestable that the contenders for political power typically had to justify their arguments in some conception of the nation that was not based on a religious faith, a particular ethnic origin, or a family dynasty, but rather in some set of principles consistent with a conception of a republic. Even when seeking to leave the nation to protect slavery, the Confederates sought to explain why their course of action was the one most consistent with the nation's founding principles.<sup>8</sup>

The creed was itself focused on the use of law to make sure that each got his due. This was true both in the sense that the governed had a role in selecting the governors, but also in the sense that all men had inalienable rights that were not granted by government and could not be taken away by

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<sup>8</sup> See, e.g., DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860), [http://avalon.law.yale.edu/19th\\_century/csa\\_scarsec.asp](http://avalon.law.yale.edu/19th_century/csa_scarsec.asp) [<https://perma.cc/J6AW-4V6A>].

government without due process of law.<sup>9</sup> Of course, the failure to apply these principles fairly to all—in particular to black people—for most of our nation's history is the primary stain on our nation. Yet, the very power of the underlying principles put strong moral force behind the ultimate decline, and one hopes, ultimately full erasure of the concept of the “other.” For present purposes, these principles also made it harder for absolutist ideologies like communism and fascism that subordinate the individual to a single collective end to take hold in the United States.

The immigrant experience in the United States also played a role in this creedal orientation. Many immigrants came from places with governments based on older traditions—less based on certain legal ideals and more on authority and national identity in the sense of ethnicity and religious denomination. One shared value among immigrants might have been a desire not to find themselves back in the same situation they had departed. Relatedly, America's revolutionary ideals of personal and economic liberty had to play an important role in the decision of many immigrants to choose the United States as their destination. And the reality that American immigrants came from diverse nations limited the possibility that any ruling elite could emerge out of a particular ethnic group using ethnicity or some proxy for it as a basis for rule.<sup>10</sup>

Building on this tradition of framing issues in a quintessentially American manner, American legal and political thinkers earlier in the 20th century had done important thinking about the evolutions in law and institutions necessary to govern a growing and rapidly changing society. Without denying the important variations in emphasis between the progressives of the early part of the 20th century and the “liberals” who populated the New Deal, the larger continuity in their vision is evident and important.<sup>11</sup> The progressive movement took seriously the idea that with economic power came responsibility. Citizens were entitled to a government that acted on the basis of principles, not payola. It was important to spread the blessings of education. And society could not function without critical new areas of legal and institutional development—administrative law—that involved the creation of institutions that were neither traditionally executive, nor traditionally

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<sup>9</sup> See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

<sup>10</sup> In the South, the concept of race may have allowed certain ruling elites to keep control over poorer whites by forging a white versus black dynamic. See generally NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA (2016).

<sup>11</sup> See Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 31–32), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3086&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3086&context=faculty_scholarship) [<https://perma.cc/GQ5T-LWKV>] (documenting the growth of the administrative state during the progressive era and World War I); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010) (documenting the substantial growth in the administrative state and developing administrative law norms, such as providing substantial procedural protections to participants in administrative processes during the late nineteenth and early twentieth centuries).

adjudicative, but that involved elements of each.<sup>12</sup> And during the relatively short American involvement in World War I, many of these principles had been put into practical use in mobilizing the American economy for the war effort.<sup>13</sup>

To my mind, no account of the NLRA or New Deal can underestimate the unique good fortune that Franklin Roosevelt emerged as the nation's leader in 1933. Had the uninspiring tenor of the Hoover era continued, instead of being replaced by FDR's sunny and confident leadership, darker answers may well have gained purchase. As is well known, Roosevelt was not a rigid thinker, and certainly not an ideologue. But he did understand the distinctly liberal direction in which he intended to take the nation, and that he stood unmistakably on the side of the many as opposed to the few. FDR served in the Wilson Administration, whose domestic agenda was progressive in nature as to economic issues; he had been in a top position during the war effort and involved in the coordination that occurred between government and the private sector to make the war effort successful; and his administration as New York governor was decidedly progressive in orientation.<sup>14</sup> Thus, when he populated his presidential administration, FDR looked to many of the most distinguished legal thinkers of his time to serve and to help build the institutions that the nation ultimately used to address the Great Depression, regulate a nationwide economy, and win World War II.<sup>15</sup>

A legal titan of course took a famous shot at FDR's intellect;<sup>16</sup> what that titan perhaps misunderstood was that who a leader surrounds himself with and entrusts with important tasks is itself a reflection of how first-rate his intellect is. For such a lengthy administration, the Roosevelt administration was notable for its lack of scandal and the quality of its key policymakers,

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<sup>12</sup> Related is the professionalization of the bureaucracy during this period, enabled by civil service reforms like the Pendleton Act, ch. 27, 22 Stat. 403 (1883) (amended 1978). As the Authors observe, "[m]any political progressives attacked patronage politics and advocated for a shift to a merit-based civil service." *America as a Developing Country*, *supra* note 2, at 40 n.71. Additionally, civil service job protections likely helped to foster expertise in agencies and legitimize the administrative state in the eyes of the public. For an argument that civil service protections, combined with legislative grants of policy discretion, help to create expert bureaucracies, see Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 87873 (2007). See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001) (exploring the development of the bureaucracy during the Progressive Era); SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* (2013) (developing further the links between institutional arrangements such as civil service systems, accountability, and expertise).

<sup>13</sup> See Lee, *supra* note 11, at 32 ("World War I drove Congress to greatly expand the breadth of its delegations to agencies, brought administration to many sectors of the economy, and grew new capacities within the Department of Defense to handle everything from excusing conscientious objectors to managing munitions.").

<sup>14</sup> See, e.g., ROBERT DALLEK, *FRANKLIN D. ROOSEVELT: A POLITICAL LIFE* 40–74, 101–33 (2017).

<sup>15</sup> See generally PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

<sup>16</sup> See KENNETH S. DAVIS, *FDR: THE NEW DEAL YEARS, 1933–1937*, at 54–55 (1986).

especially perhaps those who helped work on shaping institutions that mediated the key constituencies of a complex, modern economy. These policy-makers, like Adolf Berle, William Douglas, Samuel Rosenman, Raymond Moley, Basil O'Connor, and others, built on the prior work of icons like Louis Brandeis and on initiatives like the uniform laws movement.<sup>17</sup>

The convergence of a leader who was directionally committed, but experimental and flexible, with an evolved sense of what administrative law could be was felicitous. Perhaps most of all, what was felicitous was the convergence of a genuine national emergency with a leader who would pursue innovative solutions to address that emergency, but only solutions that were consistent with the basic concepts of liberty central to the American self-conception. Put simply, FDR was willing to do new stuff, but was in no way prepared to deny American business leaders the right to own their businesses, make a profit, or enjoy the economic freedoms traditionally celebrated as part of the American way. FDR did ask more of them—for them to recognize that there was a basic social compact that business must honor and to adapt their means of interacting with the government and constituencies like labor. But he never turned away from the basic idea of a market-based economy and the right to own property.<sup>18</sup>

Thus, instinctively, Roosevelt was drawn to evolutionary change, and as a natural political animal, to methods of governance that bridged conflicting interests by focusing the contending parties on common objectives, upon which both were ultimately dependent. In other words, FDR understood that you could not fight over who got more of the pie, unless there was in fact a pie to argue over; and that if you could create the potential for shared gains, you were more likely to be successful. Institutions of administrative law like

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<sup>17</sup> See *infra* note 27.

<sup>18</sup> As someone who knows more about the evolution of Argentina's national soccer team than its politics, I have focused my reply almost exclusively on the story that the Authors tell about the U.S. Two comparative points do deserve underscoring, however. First, it is interesting to consider how FDR's deviation from one American tradition—the Cincinnatus-inspired tradition of serving only two terms at most—was important to resisting authoritarianism and forging a strong regulatory state of the kind that emerged after World War II. Although there is no hint that FDR would have ever sought to stay in power without being elected by the people every four years, the stability his lengthy tenure provided contrasts in an interesting way with the Argentine example of frequent military interventions and coups. Second and relatedly, it is striking how central the Argentine military was in its nation's politics, and yet how comparatively unstoried its military was as a fighting power. As one of the Authors shows in other work, the U.S. had no tradition of a large standing military, and its military was smaller than that of the Netherlands on the eve of World War II. See Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1351–52 (2014); see also *America as a Developing Country*, *supra* note 2, at 52. Our military's ultimate overwhelming power in World War II derived from the democratic mobilization of a people more interested in seeking a good life through economically productive activity. That Americans saw themselves as folks who would put down the shovel, the plow, the hammer, or the accounting ledger when required to fight a war limited any cult of adoration of military leaders and also suggests how difficult it would have been for an authoritarian approach that substantially limited economic freedom to succeed in the U.S.



the NLRA that fostered constructive conditions for livable compromise were a natural component to policies based on these premises.

It is doubtful, however, that mediating structures like the NLRA could have succeeded without supporting policies creating more pie to share. No doubt the New Deal was never fully successful in overcoming the full blow of the Great Depression. Still, it did much to alleviate the worst of its effects, put many people back to work, provide greater economic security, and show that the institutions of society could respond in an effective and humane way.<sup>19</sup> The New Deal had, at its core, a commitment to providing jobs and good wages to American workers, evidenced by the fact that during the 1930s, the U.S. contributed a larger share of its own gross national product to social security relief programs than other developed countries.<sup>20</sup>

This positive momentum led FDR to a historic reelection in 1936. And when the recovery stalled in FDR's second term, there were also other forces beyond the NLRA that encouraged Americans to follow the more cooperative path of industrial-labor progress he had charted. By FDR's second term, war was looming in both Asia and Europe. Having recently experienced World War I, Americans had no taste for war and most likely saw the emerging developments as warning signals against fascism or communism, rather than highlighting them as good models to follow. Sure, some benighted elites, like Henry Ford and Charles Lindbergh, idolized the Germans,<sup>21</sup> and Father Coughlin did his best to blame working class economic insecurities on Jews,<sup>22</sup> but the United States had only recently lost over 100,000 lives fighting Germany, and the small constituencies for authoritarian, totalizing solutions—fascists and communists—were split. Not only that, but the United States had a diverse multi-ethnic white voting class to whom Aryan racial appeals of the kind Hitler made were—at that time—unlikely to find traction. As to communism, its appeal in an America, where a large segment of ordinary people still owned farms and small businesses,<sup>23</sup> was never substantial. This is not to say that workers did not want more clout; it is just to say that, by the late 1930s, a responsive system allowing that desire for greater voice to be expressed through unions within a market economy fit much better with the distinct American ethos.

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<sup>19</sup> See generally DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 363–81 (2001).

<sup>20</sup> See generally EDWIN AMENTA, *BOLD RELIEF: INSTITUTIONAL POLITICS AND THE ORIGINS OF MODERN AMERICAN SOCIAL POLICY* (2000).

<sup>21</sup> See, e.g., MAX WALLACE, *THE AMERICAN AXIS: HENRY FORD, CHARLES LINDBERGH, AND THE RISE OF THE THIRD REICH* 200 (2003).

<sup>22</sup> See, e.g., Mary Christine Athans, *Courtesy, Confrontation, Cooperation: Jewish-Christian/Catholic Relations in the United States*, 28 U.S. CATH. HISTORIAN 107, 115–16 (2010).

<sup>23</sup> See *America as a Developing Country*, *supra* note 2, at 41 (“More fundamentally, the distribution of land and wealth in the United States was also markedly different—and dispersed enough to facilitate the rise of a relatively large merchant and artisan middle class wary of corruption.”).

In other words, there were reasons aside from the NLRA itself why greater labor peace might have ensued during the late 1930s, even if the economy was not fully recovered in health. This is not to slight the NLRA's framework—it fit the time well—but it is to suggest that without the other aspects of the New Deal that created hope for more substantive economic security, the NLRA alone was likely to be inadequate.

Then, the big thing happened. World War II. *America as a Developing Country* recognizes this as seismic, but it sees history a bit differently than I do on a key point. The Authors view FDR's response to the war as signaling an end to the New Deal. I do not. The war could have led to an even more far-reaching expansion of the regulatory state than occurred, and this failure disappointed some. But, I think that emphasis on the negative ignores that the war effort cemented the New Deal's foundational role in governing American society. As *America as a Developing Country* shows, the war effort depended critically on the emergence of strong institutions and administrative law (as Cuéllar highlights in prior work),<sup>24</sup> and an expectation that the most powerful private economic interests engage in gainsharing and make their own sacrifices to make sure we won the war.

Although many economists argue that the New Deal did not itself overcome the Great Depression, the New Deal's efforts at capacity building laid important groundwork that allowed the United States to enter—and win—World War II. As the Authors recognize, before the U.S. entered World War II its “army was small, the 18th largest in the world in the spring of 1940, just behind the Dutch army that had recently surrendered to the Nazis.”<sup>25</sup> But, in part because of the New Deal's efforts at capacity building in terms of mediating institutions of law, even efforts like the National Recovery Administration (“NRA”) that did not ultimately pan out, the U.S. was able to build on the institutional development and experiments of the New Deal to move to quickly mobilize a nation to win the war. In other words, to disconnect the New Deal from the war effort seems wrong to me—the New Deal's approaches; the centralizing, national institutions it built; and even aborted experiments like the NRA, served as models for the organizational effort essential to America's success in rapidly mobilizing to defeat the Axis powers.

One of the main achievements of the New Deal—if the New Deal is considered to include the continuing development of the administrative state during the World War II era, as I believe it must be—was to extend the scope of effective government regulatory authority to make that authority coextensive with the effective scope of the U.S. domestic economy. By increasingly replacing, supplementing, and goading state governments with a view to greater effectiveness, the federal administrative state began to create a more level national playing field within which business competition would

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<sup>24</sup> See generally Cuéllar, *Administrative War*, *supra* note 18.

<sup>25</sup> *America as a Developing Country*, *supra* note 2, at 52.

take place. The NLRA was just one of the regulatory schemes that helped eventually accomplish this vital goal, and federal legislation was also accompanied by important state-level laws that were expressly designed to facilitate a national economy and a mobile population whose lives would commonly involve activities in more than one state, such as the Uniform Commercial Code and its sister uniform laws.<sup>26</sup>

The New Deal's basic idea, in many ways, was to match the scope of the regulatory state (including worker protection) to the scope of the real economy. FDR and his key advisors realized that this job would not stop at the boundaries of the United States but would have to continue if the gains of the New Deal were to be secured in an international trading regime.<sup>27</sup>

That is another important reason why I do not distinguish the New Deal from the Roosevelt administration's war effort: the administration presented the ideals of the New Deal to the world as representing the path forward to a more prosperous, peaceful, and fair international order. In advance of World War II, representatives of the Roosevelt administration argued that the expansion of trade, and the recognition of the fair expectations of working people were the best method by which nations could remain free and resist totalizing forces.<sup>28</sup> During World War II itself, FDR elevated freedom from want as an essential aspect of a genuinely free society.<sup>29</sup> Consistent with that, it was part of FDR's vision that the post-War world would involve more open markets, but among nations who committed to both expanding trade and giving working people greater assurances of fair treatment and economic security, including the rights in the NLRA.<sup>30</sup> Roosevelt viewed it as vital that the democratically elected Allied governments demonstrate that a market-based economy could work better for the many than the alternatives,

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<sup>26</sup> See generally Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995).

<sup>27</sup> See generally Adolf A. Berle, Jr., *The Construction of a General International Organization*, 10 DEP'T ST. BULL. 97, 99 (1944) (arguing that the creation of a post-War international organization to govern security and economic issues was vital to creating the conditions for a lasting peace and stable world order).

<sup>28</sup> See, e.g., Arthur W. Schatz, *The Anglo-American Trade Agreement and Cordell Hull's Search for Peace 1936–1938*, 57 J. AM. HIST. 85, 85–86 (1970).

<sup>29</sup> See Franklin D. Roosevelt, Annual Message to Congress: State of the Union Address (Jan. 6, 1941), <http://www.presidency.ucsb.edu/ws/index.php?pid=16092> [<https://perma.cc/8C2V-ANZE>] (“In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.” (emphasis added)).

<sup>30</sup> See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

including those touted by the Allies' communist rival, the U.S.S.R.<sup>31</sup> Put

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<sup>31</sup> From the beginning of his presidency, FDR linked the rise of fascism and communism and international instability to economic insecurity. See Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267, 274–82 (2019) (discussing, through a focus on FDR's close advisor, Adolf Berle, the linkage that FDR and his administration drew between economic security and the ability to maintain a peaceful world order). Thus, when World War II arose, FDR emphasized the need for the post-War order to promote economic prosperity that extended to the many, an emphasis seen in critical communications like the Atlantic Charter and his 1941 and 1944 State of the Union addresses. The Atlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, (Aug. 14, 1941) (“[The United States and the United Kingdom] desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security.”); Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 6, 1941), <http://www.presidency.ucsb.edu/ws/index.php?pid=16092> [<https://perma.cc/X657-CCW7>] (“Certainly this is no time for any of us to stop thinking about the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world.”). In his 1944 State of the Union address, FDR essentially called for a global New Deal. FDR's views factored importantly into key international agreements such as the understandings created at Bretton Woods, including its call for an International Trade Organization that would protect labor rights and the United Nations' Declaration of Human Rights. Compare Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 11, 1944), <http://www.presidency.ucsb.edu/ws/index.php?pid=16518> [<https://perma.cc/A3PY-HWRD>] (“The best interests of each Nation, large and small, demand that all freedom-loving nations shall join together in a just and durable system of peace. . . . And an equally basic essential to peace—permanent peace—is a decent standard of living for all individual men and women and children in all Nations.”), with G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 22 (Dec. 10, 1948) (“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”), and *id.* art. 23 (“1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.”), and *id.* art. 24 (“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”), and *id.* art. 25 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”); see also Robert Kuttner, *How the Globalists Ceded the Field to Donald Trump*, AM. PROSPECT (Mar. 19, 2018), <http://prospect.org/article/how-globalists-ceded-field-donald-trump> [<https://perma.cc/9SQD-ETT9>] (“The original International Trade Organization proposed at Bretton Woods called for a regime that would promote commerce but also defend enforceable labor standards. A treaty creating the ITO was negotiated in 1947, but never ratified.”); Cass R. Sunstein, *Economic Security: A Human Right; Reclaiming Franklin Delano Roosevelt's Second Bill of Rights*, AM. PROSPECT (Sept. 20, 2004), <http://prospect.org/article/economic-security-human-right> [<https://perma.cc/9VRM-ZYPP>] (“Roosevelt's speech has had a large international influence; the Second Bill of Rights should be seen as a leading American export. The Universal Declaration of Human Rights, written in the shadow of FDR and accepted by the UN General Assembly in 1948, explicitly includes social and economic guarantees.”). All of the United States' post-War initiatives built on the New Deal and its goal of making a market-based economic system work for the many, an approach quite distinct from that advocated by the United States' wartime ally, the Soviet Union.

simply, making capitalism benefit the working class was seen as crucial to cabinining not just fascism, but also the post-War growth of communism.

The war effort also created propitious circumstances for win-win economic outcomes. Demand grew enormously, as did production.<sup>32</sup> Thus, in the middle of an awful conflict emerged an unprecedented engine for prosperity. This engine hummed well into the post-War era, creating the ideal circumstances for the mediating approach taken by the NLRA to be successful, as employers had gains to share, and there was much more pie to be allocated.

The other aspects of the New Deal helped in that regard, as government's greater role in areas like health care, Social Security, disability insurance, housing subsidies, education grants, unemployment insurance, and workers' compensation meant that the economic security of working people and their families was supported not solely by employers, but by society as a whole.<sup>33</sup>

Finally, World War II and its success also help to explain in another way the story the Authors tell about the secure establishment of the American administrative state. As the Authors show, during the midst of fighting a war, the U.S. economy became the wealthiest in world history, and the nation emerged from a fierce war triumphant and productive. That the American people viewed their national government as having succeeded in overcoming not just one but two major national crises—the Great Depression and Axis aggression—imbued government leaders and institutions with confidence and respect.<sup>34</sup> Part of the lessons many Americans drew from those experiences was that a return to a shrunken national government and small military would leave the U.S. vulnerable to the same tragedies it had just overcome at great cost. Put simply, because the national government and the administrative state that FDR built were widely viewed as indispensable to America weathering the Great Depression and defeating foreign aggression, there was no appetite to dismantle them. Nor did a sound empirical case for doing so exist given the evolutions in the complexity and scale of the domestic and international issues that the U.S. was required to address.

## II.

The World War II experience of Americans, however, also had a profoundly inequitable effect, which must be considered if anyone is to come to

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<sup>32</sup> See generally HAROLD G. VATTER, *THE U.S. ECONOMY IN WORLD WAR II* (1985).

<sup>33</sup> See, e.g., Steven A. Ramirez, *The Law & Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 546–49, 558–61 (2003) (describing the successes of the New Deal's Social Security guarantee, education grants, and housing subsidies).

<sup>34</sup> In the decades following World War II into the 1960s, public trust in government was above seventy percent. See *Public Trust in Government: 1958–2019*, PEW RESEARCH CENTER (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019> [<https://perma.cc/U8PY-FHLU>]. Today, by contrast, public trust is down to about seven percent. *Id.*

grips with the rift among the working class that has hindered the ability to forge an economic system giving more voice to workers, and thus the declining economic security experienced by twenty-first century working Americans. For black Americans, it must be jarring when so many white Americans of a certain age harken back to the 1950s as an idyllic time in American history. And it is understandable that so many white Americans do so, if they consider only their own perspective as white people. For many white Americans, the post-War era is one of a confident America, proceeding from its victory over evil forces to a prosperous time of greater inclusiveness. Past religious and ethnic distinctions among white Americans were minimized by the common crucible of serving together in war.<sup>35</sup> And even on the labor front that is the focus of *America as a Developing Country*, one can imagine that the joint effort of officers and enlisted men to win the War had some bonding effect on business relations. A sense of unity and common purpose knit the nation together, and one might say that white identity became more unified than ever before.<sup>36</sup>

Contributing to the ongoing unifying effect of the War on industrial relations was also the sense that war had not ended; it was just that the enemy and mode of engagement had changed. The post-War era of American economic dominance coincided with the Cold War, and a desire on the part of policymakers and business interests to show that a market-based economy was superior to communism in terms of what it could do for working people. And, of course, during this period, America actually fought two costly hot wars in Korea and Vietnam. Thus, there were both patriotic and pragmatic reasons for gainsharing between business and labor during this period.

The inclusive experience of World War II for white Americans of diverse ethnic, religious, regional, and cultural backgrounds no doubt had strong positive aspects. An immigrant nation with a history of tensions among various European ethnic groups (e.g., think of terms like Paddy Wagon) had just mobilized in an unprecedented, widespread way to defeat not one, but two, fierce enemies. These diverse white Americans were forged together by the cauldron of war, fighting side by side in units.

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<sup>35</sup> See generally DAVID J. TROWBRIDGE, *America and World War II, 1941–1945*, in A HISTORY OF THE UNITED STATES VOL. 22 (2012) (ebook), [https://saylordotorg.github.io/text\\_a-history-of-the-united-states-vol-2/s11-america-and-world-war-ii-1941-.html](https://saylordotorg.github.io/text_a-history-of-the-united-states-vol-2/s11-america-and-world-war-ii-1941-.html) [<https://perma.cc/G2CD-MBU7>] (explaining that the experience of fighting together with people of different ethnic and religious backgrounds led many to broaden their horizons).

<sup>36</sup> See John A. Powell & Caitlin Watt, *Negotiating the New Political and Racial Environment*, 11 J.L. Soc'y 31, 38 (2010) ("The modern form of whiteness as a salient feature of identity was not well established before World War II. Instead, most Euro-Americans continued to identify along ethnic lines. The creation and expansion of modern suburbs [after World War II] changed that. Euro-Americans traded in their ethnic identity in exchange for a more generic white identity. And while there was a softening of identity between ethnic European Americans, there was a hardening of lines between the newly emerging white and blacks."); see generally RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1990).

Fighting a war together reminds folks of their larger shared interest—in a polity that works for everyone. World War II knitted together our nation. No one was exempt from its effects, even on the home front, building a perfect foundation for the commitment to the peaceful resolutions of disputes that emerged out of the New Deal. This is especially true if the troops go home to increasing prosperity and there are ways for the managers (*i.e.*, the officers) and the workers (*i.e.*, enlisted soldiers) to both gain from this growing prosperity.

This helped create a strong American identity, but also likely created a strong “white” American identity. That is, white Americans were less separated along dimensions like Catholic versus Protestant, or Irish versus Italian versus Polish, and more likely to see themselves as just Americans.

Notably absent from this common identity were black people, who were shunted into separate units. Black Americans’ different status was ultimately reinforced, not diminished, by the War effort. Although black servicemen were crucial to victory, they were not integrated into units with whites. Their different and subordinate status was instead reinforced.<sup>37</sup> “White identity” was perhaps therefore strengthened by the World War II experience, and ultimately political leaders seeking votes exploited that sense of common identity by dividing working-class voting power along racial lines.

And when the nation wisely undertook to give returning servicemen educational and housing benefits,<sup>38</sup> these had far less effect for black people. The housing benefits they got did not enable them to buy in attractive neighborhoods; they were segregated out.<sup>39</sup> The education benefits they got did not enable them to get into segregated colleges. And there was no protection for them against discrimination in the job market.

When the post-War engine of economic prosperity revved up, it therefore had a profoundly disparate effect on white people and black people. Many whites were swept upward into the middle class and beyond, and union members in particular enjoyed rising wages and living standards.

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<sup>37</sup> The U.S. Armed Forces were finally integrated by Executive Order 9981, signed by President Harry Truman on July 26, 1948. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>38</sup> See Suzanne Mettler, *How the G.I. Bill Built the Middle Class and Enhanced Democracy*, SCHOLARS STRATEGY NETWORK, (Jan. 2012), <https://scholars.org/contribution/how-gi-bill-built-middle-class-and-enhanced-democracy> [<https://perma.cc/78JD-4DT4>] (“Four out of five men born in the United States during the 1920s served in the military, and about half of them used the G.I. Bill for education and training (either right after World War II or after the Korean War, when comparably generous benefits were provided). Prior to 1940, colleges were mostly for the privileged, but the G.I. Bill opened doors to many who were Catholic and Jewish, including rural people, first-generation immigrant offspring, and veterans from working and middle class backgrounds.”).

<sup>39</sup> See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

Black Americans were largely bystanders to this special era of economic inclusion, a period when the economy worked better for the many than ever before, a period of declining inequality.<sup>40</sup>

This aspect of incomplete reform still has important consequences and has its roots in FDR's Faustian acceptance of the political pact that resolved the Civil War, one in which Jim Crow was substituted for slavery and the South's right to subjugate black people was accepted by other American regions that themselves had treated black people unfairly. In governing the nation and forging the New Deal, Roosevelt had to address the reality of the South's political power, particularly its power in the Senate due to the persistence of the bargain made at the beginning of our republic, as well as the pervasiveness of electoral practices in border states that gave disproportionate influence to rural areas where pro-Jim Crow sentiment was stronger.<sup>41</sup>

The New Deal's acceptance of Jim Crow shows that there were important ways in which the law and development story the Authors outline for the United States has its own uniquely negative aspects, just as Argentina's did. Reforms accepting the disenfranchisement of black people, the rigged power system inflating the influence of Southern whites, Southern states, and white moneyed elites in general were bound to be incomplete and to lack a firm foundation resistant to pushback down the line.<sup>42</sup>

Given the South's political power, the New Deal's positive impact on the lives of black people was far less than it should have been, and the Roosevelt administration took at best tiny steps toward racial fairness. Because of the absence of racial progress, a deep cleave existed between the white members of the working class and black people. This cleave divided the union movement itself in important ways.<sup>43</sup>

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<sup>40</sup> According to a *Yale Law Journal* note published about a decade after the NLRA was enacted, "[d]iscrimination by labor unions against racial minorities, particularly Negroes, [was] still frequent." Note, *Discrimination by Labor Union Bargaining Representatives Against Racial Minorities*, 56 *YALE L.J.* 731, 731 (1947). Indeed, although poverty rates declined for both white and black Americans during this period, black poverty continued to be much higher than white poverty. In 1959, the black poverty rate stood at 55.1%. By 1973, the black poverty rate had fallen to 30.3%. By contrast, the white poverty rate was only 18.1% in 1959, declining to 8.6% in 1974. Today, black poverty remains persistently higher than white poverty. In 2017, the black poverty rate stood at 21.2%, whereas the white poverty rate stood at 10.7%. See *Historical Poverty Tables: People and Families – 1959 to 2017*, U.S. CENSUS BUREAU, tbl. 2, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html> [<https://perma.cc/PSF2-7W2V>].

<sup>41</sup> See, e.g., Louis Menand, *How the Deal Went Down*, *NEW YORKER* (Feb. 24, 2013), <https://www.newyorker.com/magazine/2013/03/04/how-the-deal-went-down> [<https://perma.cc/GAD9-QP2Y>] (noting members of the Southern bloc were "the most important 'veto players' in American politics" during the Roosevelt presidency and that they "maintained . . . a 'Southern cage' around New Deal legislation").

<sup>42</sup> See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 151–60 (2013).

<sup>43</sup> See, e.g., Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 *HOW. L.J.* 49, 65 (2002) ("During the late nineteenth and early part of the twentieth centuries there was a fair amount of distance, and even antagonism, between blacks and the labor movement. Unions openly



The South was a huge beneficiary of the New Deal and received and continues to receive huge subsidies from other regions of the nation.<sup>44</sup> But the South never accepted the right of workers to fairly join a union in the same way it embraced other aspects of the New Deal, like agricultural subsidies, infrastructure investments, and Social Security benefits.

Union concentration in the South lagged other regions, and the votes to undercut the NLRA through the adoption of the Taft-Hartley Act<sup>45</sup> and the override of President Truman's veto were strongly supported by Southern Democratic members of Congress.<sup>46</sup> Before Taft-Hartley, several Southern states had passed so-called "right to work" statutes,<sup>47</sup> and its enactment facilitated a wave of additional states' adoption.<sup>48</sup> These were especially popu-

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excluded blacks from membership. Indeed, this history of exclusion prompted the NAACP to oppose passage of the NLRA because it created, in effect, a monopoly power in unions over worker representation, but had no provision requiring that union membership be open to all regardless of race.").

<sup>44</sup> See, e.g., Robert Pear, *Federal Government Uses North's and Midwest's Dollars to Aid the South, Study Finds*, N.Y. TIMES (Oct. 8, 1996), <https://www.nytimes.com/1996/10/08/us/federal-government-uses-north-s-midwest-s-dollars-aid-south-study-says.html> [https://perma.cc/5DD3-K4MV]; Morgan Scarboro, *Which States Rely the Most on Federal Aid?*, TAX FOUND. (Jan. 11, 2017), <https://taxfoundation.org/states-rely-most-federal-aid/> [https://perma.cc/VCT6-YS9R]; John Tierney, *Which States Are Givers and Which Are Takers?*, ATLANTIC (May 5, 2014), <https://www.theatlantic.com/business/archive/2014/05/which-states-are-givers-and-which-are-takers/361668/> [https://perma.cc/HLA9-MQN6] (showing that Southern states receive more in federal aid than they remit to the federal government in taxes while Northern states receive less in federal aid than they remit to the federal government in taxes). The failure of the New Deal to address and overcome the outlying anti-worker sentiment also has lessons for today. Although the New Deal should have gone further in my view, it did accept the central idea that the United States had to include all of its regions, including its poorest one, the South, in prosperity. The future of the European Union in large measure depends on the willingness of the people who reside in the leading European economies like Germany, France, and the Netherlands to accept that a common Europe must draw into the fold nations like Spain, Portugal, and Greece, plus the former Soviet bloc nations of Eastern Europe, while keeping in mind the U.S. lesson, which is that these nations should not be allowed to undercut the legitimate rights and economic leverage of other E.U. workers.

<sup>45</sup> Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947).

<sup>46</sup> 20 Democratic Senators—mostly from the South—joined their Republican colleagues to override President Truman's veto. See *H.R. 3020. Passage Over the President's Veto*, GOVTRACK, <https://www.govtrack.us/congress/votes/80-1947/s86> [https://perma.cc/FF8T-DAYR] (last visited Sep. 29, 2019).

<sup>47</sup> See *Right to Work States Timeline*, NAT'L RIGHT TO WORK COMMITTEE, <https://nrtwc.org/facts/state-right-to-work-timeline-2016/> [https://perma.cc/C2LP-QQY9] (last visited Sep. 29, 2019). Consistent with the notion that our society is one grounded in certain ideals, the principal state laws that act to impede the expansion and effectiveness of unions are styled "right to work" laws. This so-called right is to work free from having to join a union and, perhaps more accurately, free to be discharged at will by your employer and free to have no voice in the terms and conditions of your employment.

<sup>48</sup> See Richard D. Kahlenberg & Moshe Z. Marvit, "Architects of Democracy": *Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 234 (2013) ("Southern segregationists followed up their support for the anti-labor Taft-Hartley Act of 1947 with an array of state-based 'right to work' laws, which weaken unions by allowing employees to be 'free riders'—benefiting from union collective bargaining but not contributing dues. To this day, the states most resistant to unions are those in the former Confederacy and Jim Crow South.").

lar in the South, where a uniform wall of anti-labor state laws existed as early as 1947.<sup>49</sup>

These rifts in the New Deal coalition presaged in important ways the erosion of the labor movement's leverage in our economy. How?

Let's start with the ugliest reality: race. Starting almost as soon as the civil and voting rights legislation was passed in 1964 and 1965 and the Johnson administration began to advocate for affirmative action, politicians began to exploit race to divide white working class voters from black people, and to encourage them to cast votes that could be seen as objectively contrary to their economic interests. The Nixon and Wallace campaigns of 1968 began what continued and continues to be a trope.

The earlier failure to fully include black people in the benefits of the New Deal—post-War benefits for GIs, and perhaps most of all inclusion in the post-War economic boom—meant that when black people got full labor rights, there was in fact a great deal of catching up to do. As America's period of unrivaled economic dominance ended and periods of increasing unemployment became more common, efforts to overcome racial inequality through affirmative action became controversial. Moneyed white elites were not much affected by these efforts, but these policies affected many important decisions for middle class workers, including the promotion of teachers, police officers, and lower level white-collar workers.<sup>50</sup> And when economic tides were no longer constantly rising, zero-sum stories involving white working people unfairly bearing the brunt of affirmative action gained appeal among white workers, including many who were union members. Nixon's two successful campaigns and the later victories of Ronald Reagan all depended in no small measure on racially divisive appeals to the white working class.

Elections like those in 1968 and 1980 have consequences, particularly for the effectiveness of legislative schemes like the NLRA, where the fidelity of the administrative agency that administers the statute is critical to the

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<sup>49</sup> See *Right to Work Resources*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> [https://perma.cc/8PAJ-RUTK] (last visited Sep. 22, 2019). The deep-rooted nature of racism was reflected in unions themselves and provided both a legitimate reason to limit union power, at least in the sense of requiring unions not to discriminate on invidious bases, but also a high-minded reason for those who were not genuinely committed to equal rights for black people to restrict union rights when their real motives were different. As a distinguished scholar has noted, the duty that unions owe of fair representation to all workers in a workforce it represents arose in part out of a case where a union had systematically discriminated against black workers. See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 179–85 (2015) (citing *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198 (1944)). Business interests argued that this type of discrimination provided a reason to restrict the ability to have workforces where everyone was required to join the union, so-called closed shops. She notes, however, that the reality that the movement for right-to-work statutes was dominated by forces hostile to civil rights makes it strained to suggest that Taft-Hartley and state right-to-work laws were inspired by a genuine regard for black people, as opposed to a desire to reduce the power of working people. See *id.*

<sup>50</sup> Ditto for issues like using busing to remediate school segregation.

statute's success. The basic right of the NLRA—"the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"<sup>51</sup>—is one that has to be made real in actual cases. I graduated from law school at a time when labor law was still an important upper-level law school course. Even as of the 1980s, labor law cases evidenced a strong anti-union bias on the part of Nixon-administration appointees,<sup>52</sup> a trend that sharply accelerated under Presidents Reagan<sup>53</sup> and Bush.<sup>54</sup> To many commentators, the NLRB became an institution more often associated with delaying, thwarting, or making less effective the ability of workers to use unions to obtain better wages and working conditions.<sup>55</sup> More recent U.S. Supreme Court decisions have further reduced unions' collective bargaining power by depriving them of their ability to get fair recompense from nonunion members that the unions are legally required to represent in bargaining negotiations and discipline and discharge cases.<sup>56</sup>

A key part of the Authors' story involves the acceptance by the federal judiciary of the administrative state,<sup>57</sup> and in particular the judiciary's validation of statutes that had broad directional mandates but left important details of implementation to agencies of the Executive Branch. This acceptance enabled agencies to give life to congressional mandates over time, in a manner that took into account evolving developments, past mistakes, and new proposals for innovation. Ensuring that this was done in a rational way that considered the perspectives of key constituencies, evolving standards of administrative law provided for notice and an opportunity to be heard.<sup>58</sup> But agencies were left with a broad range of discretionary authority, subject only to an arbitrary and capricious standard of review, a standard that can be analogized to a public-law version of the business-judgment rule for someone like me steeped in corporate law. Not only that: the Authors stress that in giving life to the words of a statute through interpretation, the FDR-era courts came to be much more deferential to the agency's subject matter ex-

<sup>51</sup> 29 U.S.C. § 157 (2018).

<sup>52</sup> See Stephen C. Vladeck, *The Nixon Board and Retail Bargaining Units*, 61 CORNELL L. REV. 416, 416 (1976) ("[T]he [National Labor Relations] Board clearly expressed the essentially anti-labor bias that permeated substantial parts of the Nixon administration.").

<sup>53</sup> See Paul Alan Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269, 269–70 (1985).

<sup>54</sup> See William B. Gould IV, *The Labor Board's Ever Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505, 1510–11, 1516–17 (1999).

<sup>55</sup> See, e.g., Levy, *supra* note 53, at 269–70 ("[T]he three years since President Reagan's appointees began to join the Board, there has been an unprecedented assault on this country's labor laws. This attack was not led by legislators who are authorized to amend or repeal the Act, but by Board members who are wholly unsympathetic to the Act's purposes.").

<sup>56</sup> See, e.g., *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); see also Estlund, *supra* note 49, at 185–89 (commenting on *Harris*).

<sup>57</sup> *America as a Developing Country*, *supra* note 2, at 49–51.

<sup>58</sup> See *id.*

pertise, trusting in its basic commitment to honoring the fundamental purpose of the statute it was administering.<sup>59</sup>

In other words, the elasticity of the NLRA and other New Deal legislative frameworks brought out the elasticity in legal thinkers, including judges, on the political right. A conscious political strategy emerged on the right to undercut the New Deal and restore laissez-faire capitalism, often through judicial action.<sup>60</sup> The reality is that executive fidelity to the animating purpose of a statute—the NLRA's emphasis on working people's right to organize or the Clean Air Act's emphasis on breathable air—is vital to ensuring that the statutory purpose was in fact served. And emerging conservative legal thinkers in the Nixon and Reagan eras recognized this fact. The so-called *Chevron* doctrine, it bears noting, was largely forged in an era where right-wing administrations were enacting regulations that could be seen as more thwarting, than facilitating, of the statutory regimes they were supposedly advancing. After all, *Chevron* was a case involving an environmental group's argument that the EPA was adopting regulations to impede the central purpose of the Clean Air Act by cutting back on pollution restrictions.<sup>61</sup> That *Chevron* was a doctrine strongly supported by prior conservative justices<sup>62</sup> has not balked a new generation of activist conservative justices from seeking to undermine it, perhaps because they were deciding cases involving regulations issued by a Democratic administration and that less deference could allow them to restrict the effectiveness of the regulatory state.<sup>63</sup>

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<sup>59</sup> See *id.*

<sup>60</sup> The "Powell Memorandum," authored by then-soon-to-be Justice Lewis Powell two months before he was nominated to serve on the Supreme Court, argued for just this strategy. See Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce, 32–34 (Aug. 23, 1971), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo> [<https://perma.cc/U86F-SHJT>]. Sent to a senior Chamber of Commerce executive and entitled "Attack on American Free Enterprise System," the memorandum called for the business community to defend the free enterprise system from attack by the left. See *id.* Powell's focus in the memorandum was not the far left, but rather figures who would be considered center-left in most European social democracies. See *id.* at 32 (lamenting the shift to "some aspects" of socialism). The memorandum laid out a multi-pronged strategy for the business community that included changes to public opinion through education, the cultivation of political power, and acting through the courts—the latter of which Powell described as "a vast area of opportunity for the Chamber." *Id.* at 25–27. Although the memorandum did not identify labor as a specific area for reform, it did contrast the political power held by organized labor with that held by businesses. See *id.* at 30.

<sup>61</sup> See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>62</sup> For example, Justice Scalia wrote a strong article praising *Chevron*. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 DUKE L.J. 511 (1989).

<sup>63</sup> Compare *Chevron*, 467 U.S. at 837, with *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more. None of this is to suggest that *Chevron* is 'the very definition of tyranny.' But on any account it certainly seems to have added prodigious new powers to an already titanic administrative state."), and Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (supporting the Supreme Court's recent efforts to "rein[ ] in" the *Chevron* doctrine); see also

The incomplete acceptance of unions by the South and the body blow dealt to the NLRA by Taft-Hartley<sup>64</sup> operated to harm the leverage of American workers more generally when global competition from Japan, Germany, Korea, and other nations began to intensify in the 1970s. Americans born in this century may not remember that before there was the specter of competition from low wage industries in China, Vietnam, and India, there was arbitrage against American workers by states like South Carolina and Mississippi, arguing that more production should be shifted to states where it was quite difficult to form a union and where lower wages prevailed.<sup>65</sup> In other words, when global competition hit, American workers faced a business response that involved substituting lower-wage workers for more generously paid ones. Thus, on both the domestic and international front, businesses sought to preserve and increase profits to stockholders by diminishing the share of production costs and the share of corporate success attributable to the price of paying workers.

And this international arbitrage involving labor was itself a product of the incompletely realized nature of the New Deal order. FDR's vision for the post-War era was of the world that would embrace all elements of the New Deal. There would be liberalized trade among nations, but so too would there be protection for the legitimate rights of working people in the nations

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Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (same); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment) (same); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (questioning *Chevron's* constitutionality); cf. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) (same); *id.* at 2131 (Gorsuch, J., dissenting) (same). As Professor Metzger details, the attack on *Chevron* forms part of a broader attack on the administrative state, often from an "originalist" perspective designed to restore what some view as a "Constitution in Exile," since the New Deal. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 31 (2017); see also Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 168 U. PA. L. REV. (forthcoming 2019) (noting that critics of the administrative state, "labeled defenders of the 'Constitution in Exile,' call[ ] for a return to what they describe[ ] as the pre-New Deal constitutional order"). The originalist attack on the administrative state is in tension with the findings of distinguished scholars that substantial congressional delegations of authority to the Executive Branch were common in the nineteenth century and that judicial review was less stringent and consistent than in the twentieth century. See generally JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE FIRST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); see also Lee, *supra*; Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010).

<sup>64</sup> See Estlund, *supra* note 49, at 180–81 (arguing that Taft-Hartley had a negative effect on worker power by authorizing right-to-work laws that restricted union authority and reach and limiting the use of picketing and boycotts).

<sup>65</sup> See, e.g., Harold Meyerson, *How the American South Drives the Low-Wage Economy*, AM. PROSPECT (July 6, 2015), <http://prospect.org/article/how-american-south-drives-low-wage-economy> [<http://perma.cc/F2GF-T5TM>] ("But the shift of higher-value manufacturing to the South since the 1960s, once the South was air-conditioned and its Jim Crow laws nullified, has had a more profound effect on the American economy. Workers at the unionized auto, steel, aerospace, and other durable-goods factories in the Northern and Western states during the three decades following World War II attained a standard of living and of employment stability all but unknown to earlier generations of workers. Since the 1970s, however, that standard—and with it, the American middle class—has been eroded by the emergence of lower-wage competition from both the Global South and the domestic South.").

in the trading regime.<sup>66</sup> But the same forces that brought about Taft-Hartley also undermined the completion of Roosevelt's vision for the post-War international economic order among the market-based economies. Freer trade was encouraged by a strong international regime, the General Agreement on Tariffs and Trade, the organization that ultimately became the World Trade Organization. But efforts to secure a comparably strong international legal regime protecting the fair expectations of working people did not succeed. Proposals to put real teeth into international law to guarantee working people the legal right to join unions, bargain for fair wages, and freedom from unsafe working conditions foundered.<sup>67</sup> In comparison to the General Agreement on Tariffs and Trade and the World Trade Organization, the International Labor Organization was never given the necessary tools to protect the fair leverage of workers in the post-War trading regime.<sup>68</sup> That was in no small measure because the United States itself did not support a stronger international system of labor protection. Put simply, the era during which Taft-Hartley passed was also one where anti-labor sentiment, aided in large measure by the Southern elements of the Democratic Party itself, undercut the leverage of labor within the emerging international trading order.<sup>69</sup>

During the period of Western hegemony from 1945 to the early 1970s, this did not seem so costly. Never was growing prosperity so widely shared.<sup>70</sup>

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<sup>66</sup> See David B. Woolner, *FDR's Comprehensive Approach to Freer Trade*, THE ROOSEVELT INST. (Oct. 13, 2011), <http://rooseveltinstitute.org/fdrs-comprehensive-approach-freer-trade/> [http://perma.cc/8MMK-KQAB] (observing that Roosevelt's efforts to liberalize world trade were "accompanied by such critical pieces of legislation as the National Labor Relations Act and Fair Labor Standards Act, which vastly strengthened the place of unions in American life" and as such were aimed to provide "economic security" for all Americans); Kuttner, *supra* note 31 (noting that protections for labor rights were included in the original International Trade Organization called for after the Bretton Woods conference and were in key parts of the U.N. Charter, all inspired by FDR).

<sup>67</sup> See Strine, *supra* note 31, at 282–83 (collecting authorities on this point).

<sup>68</sup> See Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Trade Policy?*, World Bank Dev. Research Grp., Working Paper No. 1817, 55–57 (1997), <http://ctrc.sice.oas.org/geograph/labor/maskus.pdf> [http://perma.cc/TL36-J74F] (discussing the ILO's lack of "binding powers of enforcement").

<sup>69</sup> See, e.g., Sanjukta Paul, *The Double Standard of Antitrust Law*, AM. PROSPECT (June 24, 2019), <http://prospect.org/article/double-standard-antitrust-law> [http://perma.cc/DGC3-6J43] (noting that Taft-Hartley prevents workers not in the same bargaining unit within a single employer from engaging in collective action to improve their joint well-being, but that conservative antitrust policy focused solely on consumer welfare allows huge corporations to use equivalent economic leverage for their own advantage). See also Ira Katznelson et al., *The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 285–86 (1993).

<sup>70</sup> Anne Applebaum, *The Lure of Western Europe*, 66 N.Y. REV. BOOKS, (2019) (book review) ("In the early years, this gigantic and unprecedented experiment in democracy and integration brought immediate benefits for all of the members of the West. What the French called *les trente glorieuses*—the thirty years of steady growth and expansion of social benefits from the 1940s to the 1970s—had its echo elsewhere in the bloc. Germany had its *Wirtschaftswunder*, led by Adenauer's finance minister, Ludwig Erhard; Italy had its *boom economico*, an extraordinary transformation that saw incomes double and triple within a generation. Even in the dictatorships of the Iberian Peninsula, which did not join European institu-

But when that hegemony gave way and vigorous competition came from competing nations, with workforces with lower pay and few rights, the ability of businesses to compete by cutting worker pay and cutting jobs grew. And no effective cross-border regime existed that prevented that. In fact, if anything, the most powerful international bodies made it difficult to restrict imports from nations where workers did not have collective bargaining rights, safe working conditions, or decent pay.<sup>71</sup>

At the same time, government policies began to increase the power of stockholders over companies, by creating incentives that put more and more capital in the hands of professional money managers, often capital ultimately from the paychecks of working people.<sup>72</sup>

We now look back on the NLRA's halcyon period as if we were looking at an alien world. Private sector unionization has fallen from over 25% to just 11%.<sup>73</sup> The real median household income since 1984 has grown by only

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tions until the 1970s, postwar growth was remarkable: in Spain, GDP per capita rose by a factor of ten between 1960 and 1975. Growth and industrialization were accompanied by a parallel growth in social benefits: universal health care, free education, and government safety nets became the norm everywhere in Western Europe.”).

<sup>71</sup> This had obvious consequences for gainsharing between labor and capital. *See, e.g.,* Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1131–32 (2018) (“The era of declining economic inequality . . . was rather remarkable. The share of total income accruing to the top 1% declined from about 24% in the mid-1920s to a low of about 9% in the early 1970s. But since the early 1970s, economic inequality has risen steadily. In the mid-2000s, the percentage of total income that the top 1% accrued nearly equaled that which this group accrued at the high point of inequality in the 1920s. Since the Great Recession of 2008 produced a temporary pause in the top 1%’s rising concentration of wealth, this group’s share of income has resumed its rise, reaching 22% in 2012.”).

<sup>72</sup> *See* Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1879 (2018) (“First, the transformation of the American firm to prioritize maximizing shareholder returns has deeply altered the firm’s relationship with its employees, incentivizing the systematic deployment of labor-cost minimization to satisfy profitability constraints while making flexible temporary work arrangements more attractive. This shift in human resource management has corresponded with a continuous rise in labor productivity, wage stagnation, and increased returns to shareholders. While worker productivity is estimated to have grown 64.9% between 1979 and 2013, hourly compensation has only increased by 8.2%.”).

<sup>73</sup> *See* MEGAN DUNN & JAMES WALKER, BUREAU OF LABOR STATISTICS, UNION MEMBERSHIP IN THE UNITED STATES 2 (2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> [perma.cc/3N7Q-9FYG]; Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 604–05 (2007). EU labor union membership rates, by contrast, tend to be much higher, with France being a notable exception. *See* Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV. 45 (2006), <https://pdfs.semanticscholar.org/cacb/8b99492b7cf17f035cb673c2156bd920a198.pdf> [perma.cc/BMY6-UAG4] (reporting a 12.6% union density rate in the United States as of 2002, compared with a 26.3% rate across the European Union). As in the United States, however, EU union membership has also been declining. *See id.* (reporting an 11.1% decline from 1970 to 2003 in the United States and an 11.5% decline in the European Union); *see also* OECD, *Key Issues for Labour Market and Social Policy* 101, <https://www.oecd.org/els/emp/4358365.pdf> [perma.cc/226F-2KKL]. But in the EU, requirements for workers’ councils exist and apply even at companies without unions. *See* Council Directive 2009/38/EC, 2006, O.J. (L 122) 28–44, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0038> [perma.cc/7D3E-VD5L] (requiring EU member states to provide the right for workers in companies that employ at least 1,000 workers to form workers’ councils).

22% or 0.6% per year,<sup>74</sup> while the income of the top 1% of Americans has grown by over 180% or 3.4% per year.<sup>75</sup> Inequality in the United States has soared to levels last seen during the Gilded Age of the 1920s.<sup>76</sup> A president who spoke to the resulting economic insecurities of working people rose to office largely by blaming these developments on the “other,” in the form of immigrant workers within the United States and unfair competition from foreign nations. Some truth was in those arguments, but they obscured the larger reason for the diminution in economic security for the many, which was that the sound protections of the New Deal and European social democracy for working people that promoted fair gainsharing had been eroded throughout the OECD, most especially in the United States. That erosion was more profound in the United States because of the policy choices that emerged as a result of the incomplete realization of the New Deal vision at its inceptive period.<sup>77</sup>

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<sup>74</sup> See *Real Median Household Income in the United States*, ST. LOUIS FED. RES., <https://fred.stlouisfed.org/series/MEHOINUSA672N> [perma.cc/2B56-U74F] (last visited Oct. 1, 2019); see also Tyler Cowen, *Is Innovation Over? The Case Against Pessimism*, 95 FOREIGN AFF. 42, 42 (2016) (“Real wages are stagnant. The real median wage earned by men in the United States is lower today than it was in 1969. Median household income, adjusted for inflation, is lower now than it was in 1999 and has barely risen in the past several years despite the formal end of the recession in 2009.”).

<sup>75</sup> See Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, NBER Working Paper tbl. 2 (Oct. 2014), <https://www.nber.org/papers/w20625.pdf> [https://perma.cc/E77Y-B54U]. Wage stagnation and increasing inequality began to emerge in the 1970s. See *Wage Stagnation in Nine Charts*, ECON. POL. INST., <https://www.epi.org/publication/charting-wage-stagnation/> [perma.cc/KK6T-69SE]. The average hourly wage in the United States is \$22.65—almost a dollar below the average hourly wage, in terms of purchasing power, in 1973. Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budgeted in Decades*, PEW RES. CTR. (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budgeted-for-decades/> [perma.cc/V9JL-DMWX] (“After adjusting for inflation, however, today’s average hourly wage has just about the same purchasing power it did in 1978, following a long slide in the 1980s and early 1990s and bumpy, inconsistent growth since then. In fact, in real terms average hourly earnings peaked more than 45 years ago: The \$4.03-an-hour rate recorded in January 1973 had the same purchasing power that \$23.68 would today.”).

<sup>76</sup> See Saez & Zucman, *supra* note 75, at 3.

<sup>77</sup> The comparatively sharper growth in inequality and drop in gainsharing with labor in the U.S. compared to its OECD allies has in part to do with the stronger rights given to labor in those nations, which have not only more potent labor laws but also laws requiring mandatory works councils at large companies, even when those companies do not have unions. See *Inequality in Labour Income—What Are its Drivers and How Can it Be Reduced?*, OECD ECON. DEPT POL’Y NOTES No. 8 (2012), <https://www.oecd.org/eco/public-finance/49417273.pdf> [perma.cc/B76M-LAA2] (showing that “[h]igher union membership tends to be associated with lower income inequality”). Put simply, the U.S. gives more power to capital than any other country in the OECD, and less leverage to workers. Given that, the outcomes that have resulted seem logical and what is surprising is that anyone is surprised by them. Although inequality has been rising globally, the United States remains the most unequal country across its peer set. Indeed, among OECD countries, only South Africa, Costa Rica, Mexico, Chile, and Turkey have greater income inequality than the U.S. See *Income Inequality*, OECD, <https://data.oecd.org/inequality/income-inequality.htm> [perma.cc/4FX7-FU42]. And from 1985 to 2008, U.S. inequality has grown at a rate that is exceeded by few OECD countries. See *An Overview of Growing Income Inequalities in the OECD: Main Findings*, OECD, 2122, 2124



The bright spot from these realities is that the decline in economic security has been so pronounced that a renewed interest has been taken in the idea that workers will not be treated fairly unless they are heard and unless businesses are required to respect them. Rather than ugly, wrong-headed answers based on blaming the others—answers that have taken the form of Brexit in the U.K., the election of anti-immigrant parties in Italy, and the elevation of an anti-Semitic party in Hungary—what is needed is a global New Deal that embeds principles of economic fairness and guarantees economic security for the many into the globalized economic system. Put simply, the process of law and development that the Authors rightly argue is so important must logically extend to developing international institutions of legal regulation effective enough to protect the workers of a global economy. That is not a naïve statement; what is naïve is to think that separate systems of separate national regulation can provide working people who must compete in international trading markets with the economic security they deserve.

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(2011), <https://www.oecd.org/els/soc/49499779.pdf> [perma.cc/226F-2KKL] (noting that from 1985 to 2008, the U.S. was one of a few countries that saw inequality climb by more than 4%).